PETITION

FOR A

WRIT OF

CERTIORARI

Office - Supreme Court, U.S.
JAN 16 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 555

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement	2
Opinions Below	5
Jurisdiction	5
The Questions Presented	6
Reasons Relied on for Allowance of Writ of Certiorari	6
Brief in Support of Petition	10
Specification of Errors	10
I. The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with decision of this Court on the same point	10
II. The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of this Court of Appeals in other Circuits on the same point	11
The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the Seventh Circuit's prior decision on the same point	
III. The retention of both motions for a new trial by the trial judge for over six weeks before he denied them on August 1, 1952, over two months after the judgment on May 28, 1952, rendered impossible the filing of a Notice of Appeal within 30 days after the judgment	12
IV. If a timely motion for a new trial were filed by any party, this would stay the running of the time for appeal regardless of whether the party filing the Motion wrote the appeal	13
V. The motion for new trial was served in proper time	14
Copy of Opinion of the U. S. Court of Appeals for the Seventh Circuit	16

TABLE OF CONTENTS

Cases Cited

	Page
Babler v. *United States*, 137 F. 2nd, 98	7, 11
Bergeron v. *Mansour*, 152 F. 2nd 27	12
Bowman v. *Loperena*, 311 U. S. 262	2, 7, 8, 11
Daniels v. *Goldberg*, 8 F. R. D. 580 affd. 173 F. 2nd 911	12
Denholm & McKay Co. v. *Commissioner of Internal Revenue*, 132 F. 2nd 243	7, 11
Jacobs Pharmacy Co. v. *U. S.*, 71 F. Supp. 584	14
Jordan v. *Federal Farm Mortgage Corporation*, 152 F. 2nd 642, certiorari denied 328 U.S. 821 certiorari dismissed 328 U. S. 852	12
Reliance Life Ins. Co. v. *Burgess*, 112 F. 2nd 234	14, 15
Smith v. *Pollin*, 194 F. 2nd 349	12
Union National Bank of Wichita, Kansas v. *Lamb*, 337 U.S. 38	14
United States v. *Radice*, 40 F. 2nd 445	12
United States v. *Schlotfeldt*, 136 F. 2nd 935, certiorari denied, 327 U. S. 781	7, 11
Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131	7, 11

Statutes Cited

U.S.C. Title 28, Section 1254 (1)	5

Rules of Federal Civil Procedure Cited

Rule 5 (b)	14
Rule 6 (b)	2, 8, 14
Rule 6 (a)	2, 6, 8, 14
Rule 59 (b)	2, 6, 14
Rule 60	
Rule 73 (a)	2, 6, 8, 12, 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 555

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Leo Brown, individually and as guardian ad litem for Joseph J. Brown, a minor, and Joseph J. Brown, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review and reverse the order and judgment of the United States Court of Appeals for the Seventh Circuit entered November 20, 1952, dismissing for want of jurisdiction the appeal of petitioners from the judgment of the United States District Court for Northern District of Indiana entered May 28, 1952, and

the order of the United States Court of Appeals for the Seventh Circuit entered December 12, 1952, denying petitioners' motion to vacate said order entered November 20, 1952, and to remand said cause to the United States Court of Appeals for the Seventh Circuit with directions to take jurisdiction of said appeal and to consider and decide said appeal on its merits.

Summary Statement

This case presents the following important questions of Federal law and practice, all of which involve the construction and interpretation of Rule 6 (a), Rule 6 (b), Rule 59 (b), and Rule 73 (a) of the Federal Rules of Civil Procedure, or one or more of these rules.

The first of these questions has been settled by this Court in *Bowman* v. *Loperena,* 311 U. S. 262, 266, but in the present case was decided by the Court of Appeal for the Seventh Circuit in conflict therewith and also in conflict with decisions of courts of appeals of other Circuits as hereinafter set forth.

No question of fact is involved. The undisputed facts are as follows:

On March 22, 1952, respondent Continental Casualty Company as plaintiff filed in the United States District Court for the Northern District of Indiana its complaint against petitioners and against George A. Laipply and Aetna Freight Lines, Inc., a corporation, as additional defendants, for a declaratory judgment that none of defendants have any rights against respondent by reason of an occurrence described in an action of law in the Lake Superior Court at Hammond, Indiana, known as Cause No. 65141 and/or the existence of insurance policy and endorsements described in complaint, alternatively that if on the face of said policy and endorsements the relief prayed is not granted that

(a) policy and endorsements be reformed so as to exclude insurance or coverage for occurrence described in Cause No. 65141 and (b) that under said policy and endorsements so reformed a decree be entered declaring that none of defendants have any rights against respondent by reason of occurrence described in Cause No. 65141 and/or existence of policy and endorsements so reformed (R. 1).

Defendants Aetna Freight Lines, George Laipply and petitioners all filed answers denying respondent's right to relief (R. 34, 36, 38).

After a trial without jury on April 28, 1952, (R. 43) the trial court on May 28, 1952, entered findings of fact and conclusions of law and judgment thereon that none of defendants including petitioners had any rights against respondent under said insurance policy by reason of said occurrence on June 25, 1950 (R. 44).

On June 6, 1952, defendant Aetna Freight Lines, Inc. filed a motion for new trial, or in alternative for order amending judgment, findings of fact, and conclusions of law (R. 49) with affidavit showing deposit of copies of motion in mail on June 6, 1952 addressed to counsel for petitioners and respondent (R. 51).

On June 11, 1952, there was filed petitioner's motion for new trial and for new findings and conclusions and for entry of new decree (R. 52) with affidavit of one of petitioners' counsel that on June 9, 1952 at 5:00 P. M. at Chicago, Illinois, he mailed copies of motion to attorneys for defendants George A. Laipply and Aetna Freight Lines, Inc. and to attorney for respondent at Gary, Indiana (R. 57).

On June 11, 1952, respondent filed a response to petitioner's motion for new trial alleging that under Rule 59 (b) motion for new trial and service must be within 10 days after judgment, that judgment in case was on May

28, 1952; that petitioners' motion was not filed or served until June 10, 1952, more than 10 days after May 28, 1952; that said motion was too late to present any questions; that all matters attempted to be raised in said motion were fully argued and presented at trial and the court properly overruled them, and entered judgment in accordance with law and facts; and moved that petitioners' motion be stricken as filed too late or in alternative be denied (R. 57).

The response was verified by affidavit of respondents' counsel that motion for new trial was evidently mailed to him at Chicago, Illinois on June 9, 1952, and received by him at Gary, Indiana, on June 10, 1952 (R. 58).

On June 12, 1952, was filed affidavit of David H. Kraft, one of petitioners' counsel, in support of motion for new trial, alleging rendition of judgment May 28, 1952, that 10 day period for filing motion for new trial ended Saturday, June 7, 1952, and because said date and Sunday, the following days were non-court days, time for filing motion for new trial officially expired on Monday, June 9, 1952, pursuant to Rule 59, and therefore motion for new trial was properly served and filed, and affiant did not receive copy of decree of May 28, 1952, until June 3, 1952 (R. 58).

On August 1, 1952, more than 30 days after the judgment, the Court entered an order denying motion of defendant Aetna Freight Lines for new trial and amending last rhetorical paragraph of Finding No. 8 of Findings of Fact in judgment of May 28, to read as follows:

> The defendant Aetna Freight Lines, Inc., exercised no control over the tractor operators or their equipment which were under the lease arrangements while the operators were waiting for freight delivery trips. The name of the defendant Aetna Freight Lines, Inc., and Public Convenience and Necessity Permit numbers were painted on Laipply's tractor. An Ohio vehicle license had been issued to Laipply for the tractor.

and otherwise denying the alternative motion for order amending judgment, findings of fact and conclusions of law, and denying motion of petitioners for new trial and for new findings, conclusions and entry of new decree (R. 59).

On August 27, 1952, petitioners filed notice of appeal from judgment of May 28th and said order of August first (R. 62). The other defendants failed to appeal.

On October 28, 1952, petitioners filed a transcript of record with the United States Court of Appeals for the Seventh Circuit.

On October 31, 1952, respondent filed motion to dismiss appeal for want of jurisdiction. (R. 147)

On November 20, 1952, the Court of Appeals for the Seventh Circuit entered an order dismissing appeal for want of jurisdiction (R. 166).

On December 3, 1952, petitioners filed motion to vacate order of November 20, 1952 (R. 167), which was denied by order entered December 12, 1952 (R. 185).

Opinions Below

The District Court for the Northern District of Indiana rendered no opinion, in its judgment of May 28, 1952 (R. 44), nor its order of August 1, 1952, denying motion for new trial (R. 59). The Court of Appeals for the Seventh Circuit included an opinion in its order of November 20, 1952 which is in the Record (R. 166) but not reported and is reprinted here as an appendix to this Petition and Brief.

Jurisdiction

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by U. S. C. Title 28 Sec. 1254 (1).

The Questions Presented

1. Under Rule 73 (a) of the Federal Rules of Civil Procedure where a motion for a new trial is served later than ten days after entry of the judgment appealed from, but the trial Court fails to sustain a motion to strike said motion for new trial as filed too late and entertains said motion for a new trial and after considering it on its merits, denies said motion, does the judgment of the Court as originally entered become final until such denial and the full time for appeal fixed by said Rule 73 (a) commence to run and is to be computed from the entry of said order denying said motion?

2. Under Rule 73(a) of the Federal Rules of Civil Procedure where a motion for a new trial is served by one defendant within ten days after the entry of the judgment appealed from, and a separate motion for a new trial is served by another defendant later than ten days after the entry of said judgment and both motions are entertained, considered on their merits and denied in one order, does the full time for appeal fixed by said Rule 73 (a) commence to run and is to be computed from the entry of said order denying both motions even though the defendant serving the motion for new trial within 10 days after the judgment does not appeal?

3. In computing the ten day period for service of a motion for new trial after entry of judgment under Rule 59 (b) of Federal Rules of Civil Procedure pursuant to Rules 6 (a) and 6 (b) thereof, if the tenth day of said period falls on Saturday, will this period extend until and including the following Monday?

Reasons Relied On for Allowance of Writ of Certiorari

1. The decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court on the same

point, viz., *Bowman* v. *Loperena,* 311 U. S. 262, 266, and *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 137-138.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the United States Court of Appeals for the First Circuit on the same point, viz., *Denholm & McKay Co.* v. *Commissioner of Internal Revenue,* 132, F. 2d 243, 246-247; and with the decision of the United States Court of Appeals for the Eighth Circuit on same point in *Babler* v. *United States,* 137 F. 2d, 98, 99.

3. The decision of the Circuit Court of Appeals is in direct conflict with the Seventh Circuit's prior decision on the same point, viz., *United States* v. *Schlotfeldt,* 136 F. 2d, 935, 937. Certiorari denied 327 U. S. 781.

4. Important questions of federal law and practice are presented, involving the proper construction and interpretation of the Federal Rules of Civil Procedure, on appellate matters involving not only the right of petitioners to have their appeal considered on its merits, but which will arise in similar cases pending in other circuits. Petitioners were prevented from filing Notice of Appeal within 30 days after judgment by the delay of trial Court in passing on the motion for new trial.

If as in this case, a trial court would entertain a motion for new trial filed after the 10 days period, consider it on its merits and withhold its decision on that motion until after 30 days from the entry of the original judgment, it would be impossible for an appellant to file notice of appeal within the 30 day period with any degree of assurance as to the nature or the existence of the judgment appealed from. The Court in acting on such a motion might modify the judgment or sustain the motion for new trial and set aside the judgment. Moreover, filing a notice of appeal

would divest the trial court of further jurisdiction even to decide the motion of a new trial.

A similar but even more difficult situation would arise in the event of two separate motions for a new trial, by different parties one filed within the 10 day period, the other thereafter. Until both motions had been acted on there would be no assurance as to the nature of the judgment or even its existence.

A notice of appeal by one party might divest the Court of jurisdiction to decide even the motion for new trial filed in time.

Rule 73 (a) mentions only a "timely motion", without specifying by whom such a motion should be made, whether by a party afterwards taking an appeal or by anyone else. If a timely motion were filed by any party to the case this would stay the time until it was decided regardless of the party taking this appeal.

While the principle controlling this situation was definitely settled by this Court in *Bowman* v. *Loperena*, 311 U. S. 262, 266, this diversity of interpretation of these Rules of Federal Court Procedure between the Circuit Court of Appeals for the Seventh Circuit in the present case and those of other Circuits exemplified by the authorities hereinabove set forth, can lead only to confusion which should be prevented by the authoritative decision of this Court. The question therefore is of broad, general interest.

The question of computations of time under Rules 6 (a) and 6 (b) when the last day of time falls on Saturday is of general interest. Saturday at present is in effect a dies non so far as Court matters are concerned, with Courts and Clerks' offices generally closed. An authoritative statement of this Court is necessary to clarify these Rules on this question.

A supporting brief accompanies this petition.

WHEREFORE petitioners respectfully pray that this Honorable Court issue a writ of certiorari as hereinbefore prayed.

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

By LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Specification of Errors

1. The Court of Appeals for the Seventh Circuit erred in its order and judgment of November 20, 1952, dismissing (R. 166) petitioners' appeal for want of jurisdiction.

2. The Court of Appeals for the Seventh Circuit erred in its order of December 12, 1952, denying petitioners' motion to vacate order and judgment entered November 20, 1952.

I

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with decisions of this Court on the same point.

The Court of Appeals for the Seventh Circuit in its decision of November 20, 1952, overlooked the following undisputed facts in the proceedings before the trial court. On June 11, 1952, respondent filed a response to petitioners' motion for new trial alleging that said motion was too late to prevent any question; that all matters attempted to be raised in said motion were argued and presented at trial and that Court overruled them, and entered the findings, conclusions, and judgment in accord with law and facts with the motion that petitioners' motion for new trial be stricken as filed too late or in the alternative denied (R. 57).

Petitioners' motion for new trial never was stricken, but the trial Court on August 1, 1952, over 30 days after the judgment, entered its order denying petitioners' motion for new trial and also motion for new trial of defendant Aetna Freight Lines, Inc., but sustaining motion of said defendant to amend judgment, findings of fact and conclusions of law to the extent of modifying Finding No. 8 (R. 59). In so doing

the trial court failed to act on respondent's motion to strikke petitioners' motion for new trial as filed too late but afteer retaining it over six weeks denied it on its merits over ome month beyond the thirty day period after the date of judgment (May 28, 1952).

Accordingly, this case is governed by the rules stated iin *Bowman* v. *Loperena,* 311 U. S. 262, 266, and in *Wayme United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 132-137-8.

The decision of the Court of Appeals is directly in conflict with these authorities.

II

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of the Court of Appeals in other circuits on the same point.

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the Seventh Circuit's prior decision on the same point.

The decision of the Court of Appeals for the Seventh Circuit on this question is in direct conflict with the decisions of Courts of Appeals of the following circuits on the same question, namely:

Denholm & McKay Co. v. *Commissioner of Internal Revenue,* 132 F. 2d 243, 246-247, (First Circuit);

Babler v. *United States,* 137 F. 2d 98, 99 (Eighth Circuit).

The decision of the Court of Appeals for the Seventh Circuit is likewise in direct conflict with a prior decision in the Seventh Circuit on the same point, viz., *United States* v. *Schlotfeldt,* 136 F. 2d, 935, 937, certiorari denied, 327 U. S. 781, which held in a similar case that Federal Rules of Civil Procedure Nos. 6, 59 and 60 did not require a contrary ruling.

III

The retention of both motions for a new trial by the trial judge for over six weeks before he denied them on August 1, 1952, over two months after the judgment on May 28, 1952, rendered impossible the filing of a notice of appeal within 30 days after the judgment. Petitioners should not be prejudiced by this delay occasioned through no fault of their own.

If a notice of appeal was filed within 30 days after entry of judgment while motions for new trial were pending whether timely or not, the nature or even the existence of the judgment appealed from would be uncertain until the trial court should pass on the motions for new trial.

The filing of a notice of appeal under such circumstances would divest the trial court of jurisdiction to make further orders or even to pass on the motions for a new trial.

Rule 73 (a) Federal Rules of Civil Procedure.

Jordan v. *Federal Farm Mortgage Corporation,* 152 F. 2d 642, 644; certiorari denied 328 U. S. 821; certiorari dismissed 328 U. S. 852;

Bergeron v. *Mansour,* 152 F. 2d 27, 31;

Daniels v. *Goldberg,* 8 F R D 580, 581, aff'd 173 F. 2d, 911;

Smith v. *Pollin,* 194 F. 2d 349, 350;

United States v. *Radice,* 40 F. 2d 445, 446.

To sustain the decision of the Circuit Court of Appeals would force a litigant who had failed to file a timely motion for a new trial, to file a notice of appeal from the judgment within 30 days, regardless of what action the trial court took on his motion or when it did so. This doctrine would have strange consequences which would be extremely unfair to petitioners here. In this case the trial judge held petitioners' motion for a new trial for over six weeks, long

after the expiration of the 30 day period for filing notice of appeal before he entered the order of August first, denying their motion as well as the motion for new trial of defendant, Aetna Freight Lines, Inc., conceded to be timely (R. 51). Until the Court had acted on both motions, it would have been impossible to determine whether the judgment would stand, be modified, or even be set aside for a new trial. It would hardly have been fitting for the parties or their counsel to have pressed for an early decision on their motions the time for which was wholly in the discretion of the trial Judge.

It would have been difficult for any one to have prepared intelligently or filed a notice of appeal from a judgment, which no one could know, would be sustained, modified, or even set aside by the Trial Court in his order on the motions for a new trial.

However, the filing of a notice of appeal under the decisions hereinbefore cited on this point would have divested the trial court of jurisdiction and prevented further action by the trial judge even to the extent of deciding the motion for a new trial.

We submit that such consequences of the Court of Appeals decision, if permitted, would invite confusion and are not contemplated nor warranted by any statute or rules of court.

IV

If a timely motion for a new trial were filed by any party, this would stay the running of the time for appeal, regardless of whether the party filing the motion took the appeal.

Rule 73 (a) of Federal Rules of Civil Procedure.

Rule 73 (a) above cited provides, "The running of the time for appeal is teminated by a timely motion", but does

not state by whom such motion should be made, or whether it should be made by a person subsequently taking an appeal. The motion for new trial of Aetna Freight Lines, Inc., conceded as timely, was denied by and in the same order denying petitioners' motion for new trial (R. 59). As we have shown under Point III of the Brief, until both these motions were disposed of, the terms or even the existence of the judgment would have been uncertain, and would hardly be a proper basis for an appeal.

Accordingly, the only reasonable construction of Section 73 (a) is that the running of the time for appeal is terminated by a timely notice of appeal, regardless of whether the party filed this appeal after the overruling of the motion. To hold otherwise amounts to reading into the Rule that which is not there.

V

The motion for new trial was served in proper time.

If the tenth day of the ten day period for service of motion for new trial falls on Saturday, this period will extend until and including the following Monday.

Rules 5 (b), 6 (a) and 6 (b) of Federal Rules of Civil Procedure.

Rule 59 (b) of Federal Rules of Civil Procedure.

Union National Bank of Wichita, Kansas v. *Lamb*, 337 U. S. 38.

Reliance Life Ins. Co. v. *Burgress*, 112 F. 2d, 234, 240.

Jacobs Pharmacy Co. v. *U. S.*, 71 F. Supp. 584, 585.

The motion for new trial was served in proper time. The tenth day after the judgment of May 28, 1952 (R. 44) fell on Saturday, June 7, 1952. Copies of petitioners' motion for new trial were deposited in the mails addressed

to opposing counsel on June 9, 1952 (R. 57). Under Rule 5 (b) of Federal Rules of Civil Procedure service on opposing counsel was complete on deposit of the copies in the mails.

In view of the fact that Courts and Clerks' offices are usually closed on Saturdays, Saturday is in effect a legal holiday, a dies non, and being the last day of the ten day period should not be counted. The next day to be counted was Monday, when the copies were mailed. Service within the 10 day period is sufficient even though motion for new trial is not filed until after the expiration of the 10 day period under *Reliance Life Insurance Co.* v. *Burgress* 112 F. 2d, 234, 240.

Respectfully submitted,

LEO BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH J. BROWN, A MINOR, AND JOSEPH J. BROWN,
Petitioners,

By LOUIS Z. GRANT,
KELLAM FOSTER,
Counsel for Petitioners.

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit.

Before

Hon. Philip J. Finnegan, Circuit Judge, Hon. N. Nathan Swaim, Circuit Judge.

Continental Casualty Company, a corporation, (hereinafter designated as Continental) appears specially to present its motion to dismiss appeal filed in the above entitled cause by the Browns, defendants-appellants, (hereinafter designated as the Browns). A petition supporting the motion makes the following representations:

Continental filed its action in the United States District Court for the Northern District of Indiana, Hammond Division, for a declaratory judgment against the Aetna Freight Lines, Inc., its insured, a motor truck owner and driver named Laipply and the Browns. The complaint sought a declaratory judgment that there was no liability insurance coverage by Continental as to any defendant for an occurrence that injured Brown, Jr., while Laipply was driving his own tractor-truck on a personal pleasure mission. Each defendant filed an answer to the complaint.

A declaratory judgment was entered on May 28, 1952, finding in substance that under the facts and circumstances of the case none of the defendants come within the purview of the policy of insurance issued by Continental. Laipply has not appealed. Aetna Freight Lines, Inc. filed an alternative motion for a new trial or for an amendment of the judgment to provide that Continental, although affording no insurance coverage for the occurrence that caused the injury to Brown, Jr., was under a contractual duty to pay the expenses of Aetna Freight Lines, Inc., in defending against the Brown claims. That motion was overruled and Aetna has not appealed.

On June 11, 1952, more than ten days after the judgment was entered, the Browns filed a motion for a new trial. On August 1, 1952, their motion for new trial was overruled. On August 27, 1952, they filed their notice of Ap-

peal. On October 28, 1952, they filed the record in this court.

Continental, by its motion, seeks the dismissal of the appeal because the motion for a new trial was not served in accordance with rule 59 (b) of the Federal Rules of Civil Procedure, which provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

Brown's motion for a new trial was sent to counsel for Continental on June 9, 1952, through the United States mail, and he received it on June 10, 1952.

It appears that said motion was not served in accordance with rule 59 (b) of the Rules of Civil Procedure in that service on June 10, 1952 was not within 10 days from the date of judgment, as provided in said rule.

Since the Browns did not serve and file a timely motion for a new trial, nor take their appeal within 30 days from the entry of the declaratory judgment, their right to appeal was lost.

(S.) PHILIP J. FINNEGAN,
United States Circuit Judge.
(S.) H. NATHAN SWAIM,
United States Circuit Judge.

(6488)